



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA-HQ-SFUND-2012-0738; FRL- 9713-1]

[RIN 2050-AG73]

National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to amend the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), to acknowledge advancements in technologies used to manage and convey information to the public. Specifically, this revision will add language to EPA regulations to broaden the technology, to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public. By updating the language used to describe permitted technology, the lead agency will be able to serve the information needs of a broader population, while maintaining the ability to provide traditional means of public access to the administrative record file, such as paper copies and microform. The lead agency should assess the capacity and resources of the public to utilize and maintain an electronic- or computer telecommunications-based repository to make a decision on which approach suits a specific site.

DATES: This rule is effective on **[Insert date 90 days from date of publication in the**

Federal Register] without further notice, unless EPA receives adverse comment by **[Insert date 30 days from date of publication in the Federal Register]**. If EPA receives adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No.

EPA-HQ-SFUND-2012-0738, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: superfund.docket@epa.gov
- Fax: 202-566-9744
- Mail: U.S. Environmental Protection Agency, EPA Docket Center (EPA/DC), Superfund Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW, Washington, DC 20460.
- Hand Delivery: EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460. Attention Docket ID No.

EPA-HQ-SFUND-2012-0738. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-HQ-SFUND-2012-0738**.

EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Superfund Docket (Docket ID No. **EPA-HQ-SFUND-2012-0738**). This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Superfund Docket telephone number is (202) 566-0276. EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: For general information, contact the Superfund, TRI, EPCRA, RMP and Oil Information Center at (800) 424-9346 or TDD (800) 553-7672 (hearing impaired). In the Washington, DC metropolitan area, call (703) 412-9810 or TDD (703) 412-3323. For more detailed information on specific aspects of this direct final rule, contact Melissa Dreyfus at (703) 603-8792 (dreyfus.melissa@epa.gov), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460-0002, Mail Code 5204P.

SUPPLEMENTARY INFORMATION:

I. Why Is EPA Using a Direct Final Rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment as this action merely adds language to 40 CFR 300.805(c) of the NCP to broaden the technology, to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public. By updating language used to describe permitted technology, the lead agency will be able to serve the information needs of a broader population, while maintaining the ability to provide traditional means of public access, such as paper copies and microform, to the administrative record file. However, in the “Proposed Rules” section of today’s Federal Register, we are also publishing a separate proposed rule to add language to broaden the technology that the lead agency is permitted to use to make the administrative record file available to the public under 40 CFR 300.805(c), if adverse comments are received on this direct final rule. We

will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. What Should I Consider as I Prepare My Comments for EPA?

A. *Submitting Confidential Business Information (CBI)*. Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR part 2.

B. *Tips for Preparing Your Comments*. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal

Regulations (CFR) part or section number.

- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

III. Background.

A. What Is CERCLA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601-9675 (“CERCLA” or “the Act”), in response to releases or substantial threats of releases of hazardous substances into the environment or releases or substantial threats of releases into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.

B. What Is the National Contingency Plan?

To implement CERCLA, EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases or substantial threats of releases of hazardous substances into the environment and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

C. What Is the Administrative Record?

Under CERCLA section 113(k)(1) and 40 CFR 300.800(a), the lead agency is required to establish an administrative record that “...contains the documents that form the basis for the selection of a response action.” These documents are further described in 40 CFR 300.810. In addition, CERCLA section 113(k)(2)(A) requires that EPA establish “...procedures for the appropriate participation of interested persons in the development of the administrative record . . .” for a removal action. For remedial actions, EPA “...shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record...” CERCLA section 113(k)(2)(B). That is, EPA should provide the public with an opportunity to participate in the selection of a response action. In addition, CERCLA section 117 requires EPA to allow for public comment on certain aspects of a proposed remedial action. Participation by interested persons (including affected communities) ensures that EPA (or the lead agency,

if not EPA) has considered the concerns of the public, including potentially responsible parties (PRPs), in the selection of a response action.

D. How Is the Administrative Record File¹ Made Available to the Public?

CERCLA section 113(k)(1) requires that a copy of the administrative record be available to the public “...at or near the facility at issue.” 40 CFR 300.805(a). In addition, a docket containing the administrative record file should be located at the Regional office or other central location. 40 CFR 300.805(a). In the case of an emergency removal, the administrative record need only be available for public inspection at the central location, unless otherwise requested (*e.g.*, by a member of the public). 40 CFR 300.805(a)(5), 300.805(b). Reflective of the technology available at the time of the last revision to the NCP (March 8, 1990 (55 FR 8666)), the “lead agency may make the administrative record file available to the public in microform.” 40 CFR 300.805(c).

The administrative record file located at or near the site should be placed in one of the information repositories that may already exist for community involvement purposes. An information repository contains documents that relate to a Superfund site and the Superfund program in general. An information repository is required at all remedial action sites and any site where a removal action is likely to extend beyond 120 days. *See* 40 CFR 300.430(c)(2)(iii), 300.415(n)(3)(iii), 300.415(n)(4)(i). The information repository may contain information beyond the scope of the administrative record, since the documents in

¹ Typically, EPA refers to the administrative record as the “administrative record file” until EPA has selected a particular response action, to avoid creating the impression that the record is complete at any time prior to the final selection decision. *See* 55 FR 8666, 8804-5 (March 6, 1990) (National Oil and Hazardous Substances Pollution Contingency Plan Preamble).

the administrative record file relate to a particular response action selection decision at a site. For example, an information repository might contain copies of site-specific press releases or public fact sheets.

E. What Does This Amendment Do?

This direct final rule amends 40 CFR 300.805(c)-Location of the Administrative Record File in Subpart I-Administrative Record for Selection of Response Action of the National Oil and Hazardous Substances Pollution Contingency Plan, to acknowledge advancements in technologies used to manage and convey information to the public. Specifically, this revision will add language to broaden the technology, to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public regarding documents that form the basis for the selection of a response action. This amendment does not limit the lead agency's ability to make the administrative record file available to the public in traditional forms such as paper and microform. The lead agency should assess the capacity and resources of the public to utilize and maintain an electronic- or computer telecommunications-based repository to make a decision on which approach suits a specific site. Based on the preferences of the community and the lead agency's assessment of the site-specific situation, the lead agency will determine whether to provide: 1) traditional forms (e.g. paper copies; microform) 2) electronic resources, or 3) both traditional forms and electronic resources.

F. What Is the Basis for This Amendment?

Since the passage of the CERCLA², as amended, the Federal government has made strides in encouraging electronically-available data. For example, the *Electronic Freedom of Information Act Amendments of 1996*,³ amending section 552(a) of title 5, United States Code, popularly known as the *Freedom of Information Act*, provides for public access to information in an electronic format. Specifically, “For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.”⁴ In addition, “...an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.”⁵

As of 2010, 99% of the over 16,800 public libraries in the U.S. had public computers connected to the internet, with an average of 16 computer stations per library. Over 85% of these libraries had public wireless internet access, with approximately 6% planning to add access over the next year.⁶ However, the presence of an electronic- or computer telecommunications-based repository does not preclude establishing a traditional paper-based repository. The lead agency should always assess the capacity and resources of the specific community to utilize and maintain an electronic- or computer

² 42 U.S.C. 9601-9675, as amended

³ The Freedom of Information Act, 5 U.S.C. 552, As Amended By Public Law No. 104-231, 110 Stat. 3048. Available online: http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page2.htm.

⁴ Ibid. section 552 (a)(2)

⁵ Ibid. section 552 (a)(3)(B)

⁶ U.S. Census Bureau. 2010. *Table 1154: Public Library Use of Internet: 2009 and 2010*. In: *Statistical Abstract of the United States, 2011 (30th Edition): Information & Communications: Internet Service Providers, Data Processing & Libraries*. Available online: http://www.census.gov/compendia/statab/cats/information_communications/internet_service_providers_data_processing_libraries.html.

telecommunications-based repository. Based on the preferences of the community and the lead agency's assessment of the site-specific situation, the lead agency will determine whether to provide: 1) traditional forms (e.g. paper copies; microform) 2) electronic resources, or 3) both traditional forms and electronic resources. Community preferences and access to technological resources may be gleaned through community interviews conducted as part of the planning for the Community Involvement Plan at a site.⁷ In addition, in accordance with Section 508 of the Rehabilitation Act of 1973, as amended, the lead agency is responsible for ensuring that all electronic and information technology is accessible to persons with disabilities. This involves procuring, creating, maintaining and using electronic and information technology, including, Web sites, software, hardware, video and multimedia, and telecommunications, that is Section 508 compliant,⁸ as well as incorporating other techniques to ensure accessibility.

EPA's Assessment of Superfund Information Repositories

EPA conducted an assessment of Superfund information repositories (IR) as part of the Office of Solid Waste and Emergency Response Community Engagement Initiative, Action 13, Part B.⁹ While site information repositories were traditionally paper copies of documents maintained at locations near Superfund sites, today there are varying degrees of usage of electronic resources to store information, including CDs, DVDs and websites. For this assessment, EPA was interested in how the repositories are organized and maintained, as well as investigating how current technological resources could be utilized to improve

⁷U.S. Environmental Protection Agency. 2011. Superfund Community Involvement Toolkit. Community Involvement Plans. Available online: <http://www.epa.gov/superfund/community/pdfs/toolkit/ciplans.pdf>

⁸ Further information on Section 508 is available online: <http://www.section508.gov>

⁹ Access information on EPA's Community Engagement Initiative online: <http://www.epa.gov/oswer/engagementinitiative/>.

public accessibility to Superfund site information and the general cost and time associated with maintaining a repository. The approach adopted for this assessment consisted of two distinct studies: (1) a survey of EPA regional practices for establishing and maintaining information repositories, and (2) an on-site assessment of the content, completeness, and organization of information repositories. The on-site assessment consisted of visits to 28 information repositories in five EPA regions to assess the content, completeness, and organization of the repositories. A complete account of the information repository assessment and findings can be found in the *Superfund Information Repository Assessment Report (Assessment Report)*.¹⁰

This assessment found that despite the careful attention and time dedicated to appropriately locating and maintaining an information repository, it appears to be an under-utilized and outdated source of information for most communities. In general, community members inquire about information repositories relatively infrequently (between 1-6 times per year). The frequency of repository use seems to be highest for newly listed National Priorities List (NPL) sites and during the pre-Record of Decision phase in the Superfund remedial process. New materials and instructions are sent by the lead agency to the repository, and the repository staff is responsible for adding and removing documents. Due to the variation in organization and maintenance of repositories, there can be inconsistency between repositories. Most repositories contain useful information and are organized in such a way that specific documents can be found. However, some repositories lack important documents or are poorly organized due to public usage over the years.

¹⁰ Access EPA's *Superfund Information Repository Assessment Report* online: <http://www.epa.gov/oswer/engagementinitiative/rr13b.pdf>

In almost all repositories visited for this assessment, computers are available. Some of these computers did not have CD drives to avoid the introduction of viruses into the library computer system, or the CD drives were not functional. All of the libraries that were visited had internet access.

Permitting the lead agency to provide the administrative record file to the public via computer telecommunications or other electronic means could help to alleviate situations with document access that have been known to sometimes occur with disorganized or misplaced paper files. Electronic access to site documents will also make this information more widely available and accessible to a broader public audience. The presence of an electronic- or computer telecommunications-based repository does not preclude establishing a traditional paper-based repository. The lead agency should always assess the capacity and resources of the specific community to utilize and maintain an electronic- or computer telecommunications-based repository to make a decision on which approach suits a specific site. Based on the preferences of the community and the lead agency's assessment of the site-specific situation, the lead agency will determine whether to provide: 1) traditional forms (e.g. paper copies; microform) 2) electronic resources, or 3) both traditional forms and electronic resources. Community preferences and access to technological resources may be gleaned through community interviews or community technical needs assessments conducted as part of the planning for the Community Involvement Plan at a site.¹¹

IV. Statutory and Executive Order Reviews

¹¹ U.S. Environmental Protection Agency. 2011. Superfund Community Involvement Toolkit. Community Involvement Plans. Available online: <http://www.epa.gov/superfund/community/pdfs/toolkit/ciplans.pdf>

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action is not a “significant regulatory action” and is therefore not subject to OMB review. This action merely adds language to 40 CFR 300.805(c) of the NCP to broaden the technology, to include computer telecommunications or other electronic means, that the lead agency is permitted to use to make the administrative record file available to the public. This action will enable the lead agency to serve the information needs of a broader population while maintaining the ability to provide traditional means of public access, such as paper copies and microform, to the administrative record file. This action does not impose any requirements on any entity, including small entities. Therefore, pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), after considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action does not contain any unfunded mandates or significantly or uniquely affect small governments as described in Sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub.L. 104-4). This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). Because this action has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This action does not contain

any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). This action does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. Because this action does not contain legally binding requirements, it is not subject to the Congressional Review Act.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: October 26, 2012

Mathy Stanislaus,
Assistant Administrator,
Office of Solid Waste and Emergency Response.

For the reasons set out above, title 40, chapter I of the Code of Federal Regulations is

amended as follows:

**PART 300 – NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION
CONTINGENCY PLAN**

1. The authority citation for part 300 continues to read as follows:

AUTHORITY: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

2. Section 300.805 is amended by revising paragraph (c) to read as follows:

§300.805 Location of the administrative record file.

* * * * *

(c) The lead agency may make the administrative record file available to the public in microform, computer telecommunications, or other electronic means.

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